

## Ethically Representing a Lying Cooperator: Disclosure as the Nuclear Deterrent

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A defendant in a drug conspiracy case agrees to testify truthfully at the drug kingpin's trial in exchange for leniency, but she intends to give false, incriminatory testimony. That is nothing new. Cooperators' credibility is always suspect, not only because they are admitted criminals but because of their powerful incentive to lie.<sup>1</sup> Both cooperators' lawyers and prosecutors contribute unintentionally to the risk that these witnesses will falsely implicate others to benefit themselves. In their role as counselors, defense lawyers are obligated to explain the benefits of assisting the prosecution in a manner that meets the prosecutor's expectations.<sup>2</sup> Prosecutors convey their expectations indirectly through defense counsel or directly in proffer sessions with the would-be cooperator. The defendant may come to understand that to avoid harsh treatment she must implicate co-defendants who await trial, even if she has no firsthand knowledge of their conduct, and to give an account that generally conforms with the prosecutor's expectations, even if the prosecutor has some of the facts wrong.

Prosecutors are expected to try to ferret out cooperators' falsehoods while interviewing and preparing them to testify and, ultimately, to attempt to present only truthful testimony. But prosecutors may be indifferent to these responsibilities or inadequate to the task, and even conscientious and adroit prosecutors may fall short.<sup>3</sup> If the kingpin goes to trial rather than pleading guilty, the burden then shifts to the kingpin's defense attorney to attempt to discredit the cooperator through cross-examination, and finally, it falls to the jury to separate the true from the false. Juries are fallible, and many of the documented wrongful convictions have resulted from cooperators' false testimony.<sup>4</sup>

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<sup>1</sup> See, e.g., *United States v. Almeida*, 341 F.3d 1318 (11th Cir. 2003).

<sup>2</sup> See Ellen Yaroshefsky, *My Client, The Cooperator, Lied: Now What?*, 7 OHIO ST. J. CRIM. L. 659 (2010).

<sup>3</sup> See generally Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917 (1999) (discussing how prosecutors' techniques for interviewing cooperating witnesses may pressure witnesses to confirm prosecutors' evident expectations); Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 6, 20-21 (2009) (noting that prosecutors' techniques for interviewing witnesses and preparing them to testify may induce falsehoods).

<sup>4</sup> See Kevin C. McMunigal, *Defense Counsel and Plea Bargain Perjury*, 7 OHIO ST. J. CRIM. L. 653, 656-57 (2010) (discussing other actors' role in discovering the cooperators' perjury).

Suppose that after making the deal but before testifying, the cooperator confides to her lawyer that the testimony she plans to give will be “all lies” instead of nothing but the truth. That would be an unusual admission. Most clients are prudent enough to be more discreet, having little to gain by disclosing an intention to lie.

While the cooperator’s lawyer might have the impulse to cover his ears and forget what he already heard, conscious avoidance is not an appropriate response, because it disables the lawyer from giving helpful advice.<sup>5</sup> The cooperator’s lawyer should try to learn more. Perhaps he will discover that the client is exaggerating. She may contemplate giving testimony that is essentially true, but plan to shape her testimony around the prosecutor’s factual understandings, some of which are wrong. If so, the lawyer should be able to persuade her of the importance of giving a wholly truthful account, because committing perjury would threaten the leniency agreement and subject her to a perjury charge, and because an ethical prosecutor will want the whole truth rather than an account with fabricated details that may be disproved by the kingpin’s counsel.

The lawyer’s dilemma becomes far more difficult if it turns out that the cooperator really does intend to tell “all lies.” It may be that the unvarnished truth would be of no value to the prosecution and would therefore jeopardize the agreement, as might be the case where the cooperator was so low down in the drug conspiracy that she had no direct dealings with the kingpin. Now the lawyer’s task in counseling the client will be to try to dissuade her from testifying falsely and to persuade her to back out of the deal if necessary to avoid committing perjury. That will be a harder job of persuasion. If she follows this advice, the cooperator will likely have to face the initial charges—and perhaps worse, if she previously secured the deal by giving the prosecutor a false account. Her lawyer should nevertheless try to convince her that besides being wrongful and criminal, perjury is contrary to her self-interest, since it is likely to be exposed, at which point the prosecutor and judge will treat her especially harshly.

What if the lawyer is unpersuasive? The client may be confident of her ability to pass off lies as the truth. Intuitions about what to do next will likely differ. Years ago, Monroe Freedman wrote that a client’s intent to lie at her *own* trial poses one of the “hardest questions” for a criminal defense lawyer, and one that can be answered only by identifying the best of the bad alternatives.<sup>6</sup> The question about what to do when the client intends to lie at *another’s* trial is no easier. Again, there seems to be no good answer, only varying degrees of bad answers.

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<sup>5</sup> See ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION & DEFENSE FUNCTION § 4-3.2(b) (3d ed. 1993) [hereinafter DEFENSE FUNCTION STANDARDS] (“Defense counsel should not instruct the client or intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by counsel’s knowing of such facts.”).

<sup>6</sup> Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1475–79 (1966).

The lawyer has limited options. He cannot present the client's testimony in the form of a "narrative," as might be possible if she intended to lie at her own trial;<sup>7</sup> indeed, it is the prosecutor, not the cooperator's lawyer, who will be presenting her testimony at the kingpin's trial. The cooperator's lawyer has, at most, a limited role. He may counsel the cooperator outside the courtroom prior to her testimony and perhaps attend the trial to be able to protect her interests there, such as by counseling her before she takes the stand and during recesses and by making objections based on attorney-client privilege. Many lawyers will not attend the trial, however—a lapse that deprives the client of competent advice and assistance as a practical matter, if not as a constitutional or disciplinary matter.<sup>8</sup> Having put the client in the prosecutor's hands, the lawyer might reemerge only after the cooperator finishes testifying and it is time for her to plead guilty to the reduced charges (if she has not already done so) and be sentenced.

For many practitioners, the instinctive response to the dilemma would be to seek the court's permission to withdraw from the representation.<sup>9</sup> This does not prevent the client's perjury, but it does avoid knowingly assisting the client in committing perjury and in capitalizing on her perjury at her eventual sentencing. It also serves the lawyer's interest in avoiding the possible appearance of having taken a hand in the client's perjury. At the same time, withdrawing from the representation avoids having to turn against the client. Ending the representation would put the client in the position of the very many cooperators who lie without their lawyer's actual knowledge and would leave it to the ordinary criminal process to expose her perjury.

Simply ending the representation can be justified, and may be required, under the ABA Model Rules of Professional Conduct. In general, lawyers must keep clients' confidences<sup>10</sup> but may seek to terminate a representation if the client

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<sup>7</sup> See, e.g., *People v. Johnson*, 62 Cal. App. 4th 608 (Cal. Ct. App. 1998).

<sup>8</sup> From a constitutional perspective, witnesses have no Sixth Amendment right to counsel. The cooperator has a right to counsel in her pending criminal prosecution, but courts are unlikely to view her appearance as a witness at a third party's trial as a "critical stage" of the proceedings against her necessitating her lawyer's presence. Nor are courts likely to say that, under *Strickland v. Washington*, 466 U.S. 668 (1984), defense counsel's absence from the kingpin's trial is unreasonable under prevailing professional norms, that the cooperator is prejudiced as a consequence, and that defense counsel's absence is therefore a denial of effective assistance of counsel.

A more promising argument may be made that, from a disciplinary perspective, defense counsel's absence would deny the cooperator "competent representation" under disciplinary rules patterned on Rule 1.1 of the ABA Model Rules of Professional Conduct. But it is highly unlikely that a disciplinary agency would bring proceedings against a defense lawyer or that a court would impose discipline in this situation. See generally, Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1195–99 (2003) (describing, and discussing reasons for, disciplinary agencies' indifference to incompetent criminal defense representation).

<sup>9</sup> See, e.g., Fritz Scheller, *Cutting Bait*, 7 OHIO ST. J. CRIM. L. 673 (2010).

<sup>10</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009).

persists in criminal conduct involving the lawyer's services.<sup>11</sup> Recognizing that lawyers have responsibilities as "officers of the court,"<sup>12</sup> Rule 3.3 establishes an exception designed to protect the integrity of the adjudicative process. It requires a lawyer who "represents a client in an adjudicative proceeding" to remedy the client's perjury, or intent to commit perjury, including by "disclosure to the tribunal" if all else fails.<sup>13</sup> Prior to the kingpin's trial, however, this exception may not apply. It is questionable whether the cooperator's lawyer represents her "in" the kingpin's adjudication, at least if the lawyer is not in court when she testifies;<sup>14</sup> if Rule 3.3 does not apply, his duty is to maintain her confidences.<sup>15</sup>

There are problems with this approach, however. The court in the cooperator's pending case may not let the lawyer out of the representation. If the court does, the cooperator may confide to the substitute lawyer that she intends to lie, thereby replicating the dilemma. If the cooperator proceeds with her plan without the new lawyer's knowledge and her perjury contributes to the kingpin's conviction, the original lawyer should be profoundly uncomfortable knowing that his former client caused an unfair trial and possibly caused an innocent person to be convicted.

*Nix v. Whiteside*<sup>16</sup> suggests a better bad alternative—one designed to strengthen the lawyer's ability to dissuade the client from pursuing leniency by falsely implicating another. In *Nix*, the criminal defense lawyer successfully dissuaded a client, *Whiteside*, from lying on his own behalf by threatening that if

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<sup>11</sup> *Id.* at R. 1.16(b)(2) (2009).

<sup>12</sup> See, e.g., Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 63–64 (2005).

<sup>13</sup> MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2009) ("A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."). One might also consider the possible application of the obligation to "take reasonable remedial measures" if "the lawyer's client . . . has offered material evidence and the lawyer comes to know of its falsity." *Id.* at 3.3(a)(3). This provision appears to be directed solely at lawyers for parties in an adjudication, not at witnesses' lawyers who do not participate in the proceedings.

<sup>14</sup> Even as an ordinary matter, defense lawyers do not invariably attend proceedings in which their clients testify as cooperating witnesses. See *supra* note 8 and accompanying text. Where the defense lawyer expects the cooperator to commit perjury at the kingpin's trial, he may be reluctant to attend the trial for essentially the same reasons that he might want to withdraw from the representation, thereby avoiding both association with the client's intent to commit perjury and the necessity to disclose it. *Id.*

<sup>15</sup> Under the ABA's prior ethics code, the lawyer would have had discretion, but not be obligated, to disclose the client's intent to commit perjury. See MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(3) (1980) ("A lawyer may reveal: . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime."). For a review of the historical development of the rules governing how lawyers deal with lying clients, see Bruce A. Green, *Lying Clients: An Age-Old Problem*, LITIG., Fall 1999, at 19.

<sup>16</sup> 475 U.S. 157, 187 (1986).

Whiteside lied, the lawyer would tell the court.<sup>17</sup> That the defense lawyer would *certainly* expose Whiteside's perjury was a much more persuasive reason not to lie than that the judge and jury *might* discern his perjury on their own.

If all else fails to dissuade the client from telling "all lies" against the kingpin, her lawyer should explain that if she persists in this plan, he will be ethically duty-bound to expose her stated intent to lie. Of course, for the lawyer's threat to be credible, the ethics rules must be interpreted or amended to provide clearly that the lawyer in this situation must take remedial measures, including, if necessary, by exposing the client's intent to commit perjury before she takes the stand or by correcting the perjury afterwards.<sup>18</sup>

The threat of disclosure, backed by an ethical duty to reveal the client's intent to falsely implicate another, would function like the nuclear deterrent: the goal is never to have to carry out the threat to use the weapon. Clients should see that it would be strongly contrary to their interests to persist in the plan to testify falsely. Perhaps, on occasion, a foolish client will test the lawyer's resolve. But most cooperators, being demonstrably calculating and self-interested, will agree not to lie.<sup>19</sup> The lawyer can then continue the representation, which might require attempting to unravel the cooperation agreement and either defending the client at trial or negotiating a guilty plea agreement on terms that do not necessitate testimony or that contemplate truthful, though less incriminatory, testimony.

If the cooperator rejects her lawyer's advice, should the lawyer have to make good on his threat? There is a significant public benefit to preventing false testimony that would deprive a criminal defendant and the prosecution of a fair trial<sup>20</sup> and potentially cause an innocent person to be convicted. The lawyer's confidentiality duty is not inviolable and existing exceptions serve lesser ends. For

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<sup>17</sup> The threat may not have been justified under the state's rules as they then stood.

<sup>18</sup> It would be tempting to delay disclosure as long as possible to wait to see whether the drug kingpin pleads guilty, whether the prosecutor decides not to call the cooperator to testify, whether she backs out of her plan to testify falsely, or whether the kingpin is acquitted despite her false testimony. But the longer the lawyer waits, the worse the harm to the process, to the kingpin, and to the client. If the cooperator's lawyer waits until after the trial, the prosecutor may credit the cooperator and oppose efforts to overturn the verdict. If he waits until just after the cooperator testifies falsely, he broadens the harm to the cooperator and also sits by while the integrity of the criminal process is undermined. The better alternative seems to be for the lawyer to disclose the client's intent to lie before she takes the stand, and ideally, before the trial starts. That minimizes the harm to the cooperator in some cases and, more importantly, puts the prosecutor and the defense in the kingpin's case in the best position to get to the truth and avoid an unfair trial. See John Wesley Hall, Jr., *5K1.1 to be Obtained by Perjury—What to Do, What to Do?*, 7 OHIO ST. J. CRIM. L. 667, 671–72 (2010) (arguing that the cooperator's intent to lie should be disclosed to the prosecutor as early as possible); but see Roberta K. Flowers, *The Role of the Defense Attorney: Not Just an Advocate*, 7 OHIO ST. J. CRIM. L. 647, 651 (2010) (arguing that the lawyer should make a "noisy withdrawal" from the representation but make disclosure only if the defendant proceeds to testify falsely).

<sup>19</sup> In this scenario, the lawyer can test the sincerity of the client's agreement. It will be fair to assume that she is insincere if she does not withdraw from the agreement, authorize the lawyer (or another lawyer) to attempt to renegotiate it, or disclose the truth to the prosecutor.

<sup>20</sup> See, e.g., *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

example, ethics rules let a lawyer disclose client confidences to prevent or rectify proprietary and financial harm from client misconduct involving the lawyer's services.<sup>21</sup> The importance of preventing wrongful convictions is more compelling. But there are countervailing concerns favoring the preservation of confidentiality and loyalty. The client whose intentions are revealed will feel betrayed, making it hard for her to trust a future lawyer. Future clients who learn of the disclosure, or of the disclosure obligation generally, may be chilled from confiding in their lawyers.<sup>22</sup> Further, disclosures may sometimes be made when the client would not ultimately have testified falsely, thereby prejudicing the client unnecessarily.

It would be a harder question if the lawyer lacked prior knowledge of the client's intent to lie but learned only after the client completed testifying that she had falsely implicated the kingpin. Some lawyers would say that in this situation, even if the lawyer knows that the kingpin is innocent, and even if the kingpin is convicted, the cooperator's lawyer should preserve the client's confidences. Their reasoning is that the fairness of criminal proceedings depends on defendants'

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<sup>21</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2)–(3) (2009).

<sup>22</sup> Criminal defense attorneys are advised to "seek to determine all relevant facts known to the accused." DEFENSE FUNCTION STANDARDS, *supra* note 5, at 4-3.2(a). The premise is that effective defense representation—and, consequently, the successful functioning of the criminal justice system—requires defense counsel to be fully informed of the relevant facts known to the client. Further, criminal defense attorneys have a "duty to advise a client to comply with the law," including the perjury law, and it is hard to do so effectively if the client does not confide her intent to lie in the first place. *Id.* at 4-3.7(a). Therefore it might be argued that insofar as confidentiality exceptions discourage defendants from confiding fully in their lawyers, they undermine the broad, long-term public interest.

Whether defendants know about the confidentiality exceptions, absent advice about them by defense counsel, is uncertain. Professor Leslie Levin surveyed New Jersey lawyers and found that most lawyers do not tell their clients about the confidentiality exceptions and that when lawyers do so, it is because they anticipate that a specific exception may become applicable. Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 120–26 (1994). In *Purcell v. Dist. Attorney*, 676 N.E.2d 436, 440 (Mass. 1997), the Court suggested that lawyers should not "warn a client in advance that the disclosure of certain information may not be held confidential" because doing so would "chill[] free discourse between lawyer and client and reduc[e] the prospect that the lawyer will learn of a serious threat to the well-being of others." But several academics have argued that clients are misled as a result. See, e.g., Lee Ann Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality*, 39 CATH. U. L. REV. 441, 489–90 (1990) (concluding that "an attorney practices deception upon a trusting client when she misstates or refuses to disclose those circumstances that constitute exceptions to the attorney-client privilege"); Roy M. Sobelson, *Lawyers, Clients and Assurances of Confidentiality: Lawyers Talking Without Speaking, Clients Hearing Without Listening*, 1 GEO. J. LEGAL ETHICS 703, 771 (1988) (contending that "it is clearly misleading to suggest to a client that 'everything is confidential'" and offering a model form describing clients' rights and the lawyer's duties).

It might also be argued that if defense lawyers have an ethical duty to prevent a cooperator's false testimony when they know of the cooperator's intent to lie, prosecutors will become less diligent about seeking to ensure that cooperators testify truthfully. That seems unlikely though, since lawyers will rarely know that their clients intend to lie, however strongly they suspect it.

ability to secure adequate representation, which requires that defendants be able to trust and confide in their lawyers, which in turn requires minimizing the circumstances under which their lawyers may or must betray their confidences. The public interest in promoting justice for all by preserving a strong duty of confidentiality, some would argue, outweighs the social value of correcting an individual injustice.<sup>23</sup> Even if so, it is different when the lawyer has advance knowledge of the client's intent to lie. In that case, the instrumental role of a disclosure obligation in client counseling should tip the balance. The ethical obligation to disclose the client's stated intent if the lawyer knows of it in advance is essential to the lawyer's ability to persuade the client to change her mind.<sup>24</sup>

Finally, on the theory that an ounce of prevention is worth a pound of cure, steps should be taken to reduce the ranks of those who enter into cooperation agreements with the intent to testify falsely. As noted at the outset, prosecutors' expectations and inducements influence defendants to make deals that lead to perjury. Regardless of what one thinks the best of the bad responses may be when

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<sup>23</sup> The debate on this question has recently been spurred by several cases, most famously that of Alton Logan, in which lawyers have come forward to exonerate incarcerated defendants years after they were convicted. See Colin Miller, *Ordeal By Innocence: Why There Should Be a Wrongful Incarceration/Execution Exception to Attorney-Client Confidentiality*, 102 NW. U. L. REV. 391, 391–92 (2008) (noting cases of Alton Logan and Lee Wayne Hunt); see also Donna St. George, *Attorney Struggled over Case for Years*, WASH. POST, Jan. 21, 2008, at B1 (discussing disclosures in Daryl Atkins's case by co-defendant's lawyer). In two states, Alaska and Massachusetts, the ethics rules specifically allow a lawyer to disclose client confidences to rectify a false conviction. ALASKA RULES OF PROF'L CONDUCT R. 1.6(b)(1)(C) (2009) (allowing disclosures "to prevent reasonably certain . . . wrongful execution or incarceration of another"); MASS. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2009–10) (allowing disclosures "to prevent the wrongful execution or incarceration of another"). Some would argue that when an innocent defendant receives a significant prison sentence, a lawyer may also disclose client confidences under the ABA Model Rules. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2009) (permitting a lawyer to reveal client confidences "to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm"); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 66 cmt. c (2000) (interpreting "serious bodily harm" to include "the consequences of events such as imprisonment for a substantial period"). But the premise is controversial. A committee of the ABA Criminal Justice Section recently drafted a proposal to amend the ABA Model Rules to say explicitly that a lawyer has permission to disclose client confidences to exonerate a third party, but the proposed rule was exceedingly narrow, in that it would apply only after the client's death. See Peter A. Joy & Kevin C. McMunigal, *Confidentiality and Wrongful Incarceration*, CRIM. JUST., Summer 2008, at 46, 46–47. And even at that, the proposal occasioned strong opposition from the National Association of Criminal Defense Lawyers ("NACDL"), a leading representative of criminal defense practitioners, on the ground that "the attorney-client privilege is too important to justify yet another exception." Letter of Norman L. Reimer, Executive Director, NACDL, to Jack Hanna, Section Director, ABA Criminal Justice Section (Apr. 25, 2009) (on file with the journal).

<sup>24</sup> If the cooperator's counsel discloses the client's intent to commit perjury at the kingpin's trial, it does not follow that her statements to her lawyer should be admissible against her in a subsequent criminal prosecution. See, e.g., *Purcell v. District Attorney*, 676 N.E.2d 436, 440 (Mass. 1997) (stating that a lawyer's disclosure of his client's intent to commit arson should not be held to waive the attorney-client privilege, because "[l]awyers will be reluctant to come forward" to disclose their clients' threats against others "if they know that the information that they disclose may lead to adverse [criminal] consequences to their clients.").

the client confesses an intention to tell “all lies,” efforts should be made to reform criminal practice to reduce the risk that defense lawyers will face this dilemma in the first place.<sup>25</sup>

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<sup>25</sup> See Peter A. Joy, *Constructing Systematic Safeguards Against Informant Perjury*, 7 OHIO ST. J. CRIM. L. 677 (2010); Rory K. Little, “*It’s Not My Problem?*” *Wrong: Prosecutors Have an Important Ethical Role to Play*, 7 OHIO ST. J. CRIM. L. 685 (2010).